IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JERRY BRACK,	)	
Plaintiff,	)	
v.	)	No. 01-2997 D/V
SHONEY'S, INC. d/b/a, CAPTAIN D'S # 3126,	)	
Defendant.	)	

ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY FEES AND COSTS AND
ORDER DENYING DEFENDANT'S MOTION TO STRIKE
AND FOR PROTECTIVE ORDER

Before the Court are 1) the motion of Jerry Brack ("Plaintiff") for attorney fees and costs pursuant to Title VII, 42 U.S.C. § 2000e-5(k), and 42 U.S.C. § 1988; and 2) the motion of Shoney's Inc. d/b/a Captain D's #3126 ("Defendant") to strike Plaintiff's motion for fees and costs and, alternatively, for a protective order allowing redaction, limitations, and limited disclosure of any of Defendant's billing records that must be produced. Plaintiff requests attorney fees in the amount of $168,698.75 for Florence M. Johnson and $38,362.50 for Christopher Taylor, for a total attorney fee award of $207,061.25. Plaintiff requests expenses and costs of $5,706.98 for Ms. Johnson and $10,435.16 for Mr. Taylor, for a total cost award of $16,142.13. Upon review of the materials submitted by the parties, the Court awards attorney fees in the amount of $108,160.50 to Ms. Johnson and $35,104.88 to Mr. Taylor, for a total attorney fee award of $143,265.38. The Court also denies Plaintiff's motion for costs, as already ruled upon by the Clerk of Court and now untimely.

Finally, the Court denies Defendant's motion to strike or, alternatively, for a protective order as moot based on the Court's granting of the fee award.

I. Background

On December 12, 2001, Plaintiff filed a complaint alleging 1) color discrimination in violation of Title VII, 42 U.S.C. § 2000e, et seq.; 42 U.S.C. § 1981; and the Tennessee Human Rights Act; 2) unlawful retaliation; 3) hostile work environment/racial harassment; 4) outrageous conduct/ intentional infliction of emotional distress; and 5) breach of contract.

On March 12, 2003, this Court granted summary judgment to Defendant on all of Plaintiff's claims except 1) color discrimination based on transfer, 2) retaliation based on discharge, and 3) hostile work environment/racial harassment.

After a four-day jury trial, the jury returned a verdict for Plaintiff on all the remaining claims. The jury awarded Plaintiff compensatory damages of $50,000.00 and punitive damages of $30,000.00. The Court entered judgment on the jury verdict on November 26, 2003.

On Plaintiff's submission of a bill of costs in the amount of $15,996.39, and after a hearing on the issue, the Clerk of Court entered an order taxing costs to Defendant of $3,904.65. Neither party appealed this order.

Plaintiff filed this motion for attorney fees and costs on January 26, 2004. Defendant responded on February 13, 2004, arguing that the Court should reduce the fee award to $56,650.88 and deny Plaintiff's request for costs in its entirety. Plaintiff replied on March 29, 2004. Defendant then filed its motion to strike Plaintiff's motion for fees and costs and, alternatively, for a protective order, on May 13, 2004. Plaintiff responded on July 1, 2004. Defendant replied on July 12, 2004.

II. Attorney Fees

Section 1988(b) permits "the court, in its discretion, [to] allow the prevailing party . . . a reasonable attorney's fee." 42 U.S.C. § 1988(b) (2004). Similarly, in a Title VII action, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee." 42 U.S.C. § 2000e-5(k) (2004).[1] The Court here uses the "lodestar" method of calculating fees, "whereby the court multiplies a reasonable hourly rate by the proven number of hours reasonably expended on the case by counsel." Geier v. Sundquist, 372 F.3d 784, 791 (6th Cir., 2004); see also Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.").

In support of his motion for attorney fees, Plaintiff submitted 1) detailed billing summaries of Ms. Johnson's and Mr. Taylor's time spent on the case; 2) affidavits of other attorneys supporting Ms. Johnson's claim to a fee of $275/hour and Mr. Taylor's claim to a fee of $225/hour; 3) Ms. Johnson's affidavit describing her legal experience and her participation in this case; and 4) Mr. Taylor's affidavit describing his legal experience and his participation in this case.

Ms. Johnson asserts that she spent 613.45 hours performing necessary legal services in this matter, and she requests a fee of $275/hour for services rendered. Mr. Taylor asserts that he expended 176.40 hours, and he requests a fee of $225/hour. Defendant first objects that the fees requested by each attorney are excessive in light of their experience and in comparison to standard

[1]The parties do not dispute that Plaintiff is a prevailing party under these fee-shifting statutes, and, indeed, Plaintiff is such a prevailing party. See Farrar v. Hobby, 506 U.S. 103, 111 (1992) ("[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim.").

fee rates in Western Tennessee. Defendant asserts that a more appropriate rate would be $200/hour for Ms. Johnson, an attorney practicing employment law in Western Tennessee with twelve years' experience, and $175/hour for Mr. Taylor, an attorney practicing employment law in Western Tennessee with seven years' experience.

"To arrive at a reasonable hourly rate, courts use as a guideline the prevailing market rate, defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." Geier, 372 F.3d at 791. Defendant submits the affidavits of Colby S. Morgan, Jr., an attorney in Tennessee and New York with twenty-seven years' experience, and Todd P. Photopulos, an attorney in Tennessee with seven years' experience, to support its argument that the hourly rates claimed by Plaintiff's attorneys are excessive.[2] Plaintiff, conversely, submits the affidavits of Kathleen Caldwell, an attorney in Tennessee, Arkansas, and Mississippi with twenty-two years' experience, and Mark Allen, an attorney in Tennessee, to support his argument that the hourly rates of $275/hour and $225/hour are reasonable in this market and for this case.[3] After considering the parties' submissions, the Court finds that the higher hourly rates of $275/hour for Ms. Johnson and $225/hour for Mr. Taylor are reasonable in this case and in comparison to the prevailing market rates. The case involved the complex and novel issue of color discrimination. It was the first such case tried in this district and perhaps in this circuit. Moreover, every issue in this case was hotly contested. Accordingly, the Court finds that the hourly rates requested by Plaintiff's attorneys are reasonable.

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[2]Mr. Photopulos attests that his normal hourly rate is $170/hour. Mr. Morgan's normal hourly rate is not provided.

[3]Ms. Caldwell attests that she receives a normal hourly rate of $250/hour, and Mr. Allen attests that he receives a normal hourly rate of $300/hour.

The Court also finds, however, that certain billing entries involve clerical or other para-professional matters (for example, letter writing, entering dates in a calendar, and arranging for court reporting services), for which such a high rate is not reasonable. The Court finds that a rate of $100/hour for such tasks is reasonable. Upon review of the billing records, the Court determines that 71.15 hours of Ms. Johnson's time involved such clerical work, and accordingly, the Court subtracts $12,451.25 from her fee award ((71.15 hours * $275/hour) - (71.15 hours * $100/hour) = $12,451.25). The Court determines that 0.3 hours of Mr. Taylor's time involved such clerical work, and accordingly, the Court subtracts $37.50 from his fee award ((0.3 hours * $225/hour) - (0.3 hours * $100/hour) = $37.50).

The Court next determines whether the billing records reflect a reasonable number of hours expended by counsel. Defendant objects that certain of Mr. Taylor's billing entries reflect duplicative work, in that they show identical entries for identical amounts of time on single days, and thus one entry should be eliminated from each such day. The Court agrees. The Court finds that 6.1 hours in Mr. Taylor's records are duplicative entries and thus subtracts $1,372.50 from his fee award (6.1 hours * $225/hour = $1,372.50).

Defendant also objects that certain of Ms. Johnson's entries reflect excessive time billed for the work performed. Defendant submitted several examples of extremely short letters written by Ms. Johnson to Defendant's counsel, for which Ms. Johnson billed either 0.5 or 1.0 hours each to write, as well as examples of extremely short letters written by Defendant's counsel to Ms. Johnson, for which Ms. Johnson billed 0.5 hours each to read. The Court agrees that those entries reflect excessive billing. The Court finds 6.3 hours of such excessive billing in Ms. Johnson's records and accordingly reduces her fee award by $1,732.50 (6.3 hours * $275/hour = $1,732.50).

Defendant also makes the following objections as to excessive hours: 1) that the records included time expended on claims on which Plaintiff did not succeed; 2) that many of the attorneys' entries were too vague to be included; and 3) that Ms. Johnson's billing records reflect a minimum billing increment of 0.25 hours, which is excessive and results in padding of hours. Three different kinds of issues can arise involving excessive hours: 1) whether the lawyer actually worked the hours claimed or is padding the account, 2) whether the work performed was sufficiently related to the points on which the party prevailed as to be compensable, and 3) whether the lawyer used poor judgment in spending too many hours on some part of the case or by unnecessarily duplicating the work of co-counsel. Coulter v. State of Tenn., 805 F.2d 146, 150-51 (6th Cir. 1986). The attorney requesting a fee award has the burden of documenting the number of hours spent on the case and of "maintaining records in a way that would allow a court to determine how much time was spent on each claim." Moore v. Freeman, 355 F.3d 558, 566 (6th Cir. 2004).

The Court first addresses Defendant's argument that the fee award should not include hours spent on claims on which Plaintiff did not prevail. When a prevailing plaintiff succeeds on only some of his claims for relief, the court must ask whether those claims on which he failed were unrelated to those claims on which he succeeded, in that they presented distinctly different claims for relief based on different facts and legal theories. See Hensley, 461 U.S. at 434-35. In such a case, the attorney's work on one claim will be unrelated to the work on another claim, and work on the unrelated, unsuccessful claims should be excluded from the fee award. Id. at 435. A court should not simply reduce a fee award through a mathematical formula comparing the ratio of successful to unsuccessful claims. See id. at 435 n.11; Phelan v. Bell, 8 F.3d 369, 374 (6th Cir. 1993). Instead, the court should focus on the significance of the relief obtained in relation to the

hours reasonably expended on the litigation. Hensley, 461 U.S. at 435; see also Moore, 355 F.3d at 566 (holding that it was abuse of discretion for district court simply to reduce fee award by five-sixths, when plaintiff prevailed on only one out of six claims, without considering extent to which claims were interrelated or how successful plaintiff was in context of case as a whole).

> The question is not whether a party prevailed on a particular motion or whether in hindsight the time expenditure was strictly necessary to obtain the relief achieved. Rather, the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed.

Wooldridge v. Marlene Indus. Corp., 898 F.2d 1169, 1177 (6th Cir. 1990).

In its order granting in part Defendant's motion for summary judgment, the Court dismissed Plaintiff's claims for 1) color discrimination based on Plaintiff's demotion, reduction of hours, and discharge; 2) retaliation based on Plaintiff's request for reduction of hours and on the reduction of his hours; 3) outrageous conduct/intentional infliction of emotional distress; and 4) breach of contract, based on a writing stating that Defendant would promote Plaintiff from Restaurant Supervisor to Restaurant Manager. For the claims on which the Court denied summary judgment, the jury found in favor of Plaintiff. The Court finds that all the dismissed claims except for the breach of contract claim were interrelated with the successful claims. All those claims concerned Plaintiff's employment with Defendant and his treatment by other employees, so the same set of facts was involved. Most of them also involved the same legal theories as did the successful claims, in that all of the color discrimination claims came under the same Title VII legal standard, as did all of the retaliation claims. Thus, these claims were so interrelated with the successful claims that the Court finds that a reasonable attorney would believe that the work expended on the unsuccessful

claims was reasonably expended in pursuit of success on the remaining claims.

On the other hand, the breach of contract claim involved an entirely separate set of facts and legal theories, and the Court finds that it was not interrelated with Plaintiff's other claims. Therefore, any work expended by Plaintiff's attorneys in pursuing the breach of contract claim should be discounted from the fee award. The attorneys' billing records do not distinguish time expended on the breach of contract claim, even though it is their burden to demonstrate to the Court which time entries involved which claims. Accordingly, the Court will discount for time expended on the breach of contract claim as part of the overall percentage reduction of the fee awards, as discussed below. As Mr. Taylor joined the case only twelve days before Plaintiff submitted his response to Defendant's motion for summary judgment, the percentage reduction of his award on this basis will be less than that of Ms. Johnson's award, as Ms. Johnson must have performed a greater amount of work related to the summary judgment motion, simply based on her longer time with the case.

The Court also agrees with Defendant that many of the billing entries submitted by Ms. Johnson are too vague to be included in their entirety in a fee award. See Moore, 355 F.3d at 566. For example, many of her entries are only "Legal Research on Issues," "Correspondence to _____," "Correspondence from _____," or similarly imprecise statements. Such entries do not enable the Court to conclude that all of her billed time was reasonably expended. As such, the Court will include its vagueness concerns in its overall percentage reduction of Ms. Johnson's fee award. Conversely, the Court finds that Mr. Taylor's billing records are sufficiently detailed such that the Court can determine the subject and purpose of the hours that he expended, and thus the Court will apply no reduction for vagueness to his fee award.

Finally, the Court agrees with Defendant that it appears that Ms. Johnson applied a minimum billing increment of 0.25 hours, with additional increments of 0.25 hours, resulting in excessive hours. "The court looks with disfavor on minimum billing increments because they result in padding of time and do not accurately reflect the actual time required to perform a particular service. Padding hours demonstrates lack of billing judgment, and hours may be cut for padding." Anglo-Danish Fibre Indus., Ltd. v. Columbian Rope Co., No. 01-2133-GV, 2003 WL 223082, at *8 (W.D. Tenn., Jan. 28, 2003). Review of Ms. Johnson's records shows 20 entries composed solely of the 0.25 minimum increment. Another 340 records were composed solely of 0.5 hours, the 0.25 minimum increment plus another 0.25 increment.[4] Most of the entries are for writing or review of correspondence or for telephone calls. The Court finds these entries to be excessive and, accordingly, will reflect them in the overall percentage reduction taken from Ms. Johnson's fee award. The Court does note that four entries in Ms. Johnson's billing log show smaller increments than 0.25 hours: 0.1 hours on September 4, 2001; 0.15 hours on November 13, 2001; 0.1 hours on April 26, 2002; and 0.15 hours on December 18, 2003. Out of the hundreds of entries submitted by Ms. Johnson, these four examples do not negate the finding of a 0.25 minimum billing increment. Mr. Taylor's records reflect a 0.1 hour minimum billing increment, which the Court does not find similarly objectionable because it is so much smaller than the increments used by Ms. Johnson.

The Court will apply the following overall percentage reductions: 1) the Court reduces Ms. Johnson's fee award by 30% to account for time expended on the unsuccessful and unrelated breach of contract claim, vague billing entries, and the use of minimum billing increments; and 2) the Court

[4]The Court does not include in these tallies those entries already reduced based on Defendant's submitted examples of the actual work conducted, as described above.

reduces Mr. Taylor's fee award by 5% to account for time expended on the breach of contract claim. Those reductions bring the total fee award to a reasonable amount based on hours reasonably expended. Accordingly, the fee awards are as follows: Ms. Johnson's fee award is $108,160.50 ($154,515.00 * 0.7), and Mr. Taylor's fee award is $35,104.88 ($36,952.50 * 0.95). The total fee award for Plaintiff's attorneys comes to $143,265.38.

Defendant makes the following additional objections to the attorney fees requested: 1) the two attorneys recorded duplicative time for performing identical work, and 2) the fees incurred prior to and unrelated to the lawsuit are not compensable. The Court disagrees with both of these objections. As to the recording of duplicative time for each attorney, in a case with multiple attorneys, it is inevitable that some of the same work will be performed by both attorneys. For example, both attorneys will want to review the Court's orders, to stay abreast of the status of the case. Also, both attorneys may bill for their meetings with each other, as both attorneys' time is being expended. Finally, if both attorneys attend depositions or court hearings, then, again, both attorneys' time is being expended and may be billed. The Court finds no unnecessary duplicative billing here. As to time expended prior to and allegedly unrelated to the lawsuit, specifically that expended in Ms. Johnson's representation of Plaintiff at his unemployment hearing, the Court finds that the facts and issues involved in the unemployment hearing were sufficiently related to those facts and issues involved in the employment claims in this lawsuit that the time may properly be included in the fee award.

The Court notes finally that it has not found this to be a rare or exceptional case that would merit any upward adjustment of the fee award. Once the Court determines the lodestar figure, it may, in limited circumstances, consider other factors and adjust the award upward or downward to

achieve a reasonable result. See Geier, 372 F.3d at 792. In considering such an adjustment, the U.S. Supreme Court has cited with approval the twelve factors[5] listed in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). See Hensley, 461 U.S. at 430 n.3; Geier, 372 F.3d at 792. The Supreme Court, however "has limited the application of the Johnson factors, noting that 'many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate.'" Geier, 372 F.3d at 792 (quoting Hensley, 461 U.S. at 434 n.9); see also Blum v. Stenson, 465 U.S. 886, 897 (1984) ("When, however, the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee contemplated by § 1988."). Although those factors may still be relevant, it appears that a district court must first find that the case is "rare" or "exceptional" in order to apply them. Geier, 372 F.3d at 793-94. The Court here finds that this is not a rare or exceptional case, such that any upward adjustment of the fee award is necessary. Rather, the factors identified in Johnson are, as usual, reflected in the higher hourly rate and the number of hours reasonably expended by the attorneys on the case, and the product thereof is the reasonable fee.

[5]Those factors are: (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974).

III. Expenses and Costs

Based on the expense records of each attorney, Plaintiff requests a cost award of $5,706.98 to Ms. Johnson and $10,435.16 to Mr. Taylor. Plaintiff submitted a bill of costs to the Clerk of Court on December 10, 2003. The Clerk awarded costs of $3,904.65 to Plaintiff. In that January 13, 2004, order, the Clerk stated that his action may be reviewed by the Court upon motion, served within five days of the docketing of the Clerk's order. Neither party appealed the Clerk's order within the specified five days. Accordingly, the Court declines to readdress the issue of expenses and costs here. The Court denies Plaintiff's request for expenses and costs, over those already awarded by the Clerk, in its entirety.

IV. Defendant's Motion

Defendant first requests that the Court strike and dismiss Plaintiff's motion for attorney fees. The Court here grants in part Plaintiff's attorney fee request. Accordingly, the Court denies Defendant's motion to strike as moot.

Defendant next requests that, if the Court conducts any further factual inquiry into billing in this case, the Court enter a protective order for any of Defendant's billing records to be produced, allowing redaction of the records, a limit on the records to be produced, and limited disclosure of the records. The Court declines to conduct any further factual inquiry into billing and therefore denies Defendant's request for a protective order as moot.

V. Conclusion

Upon consideration of the billing records, other materials, and arguments submitted by the parties, the Court **GRANTS** in part Plaintiff's request for attorney fees. The Court determines that a reasonable attorney fee in this matter is $108,160.50 for Ms. Johnson and $35,104.88 for Mr. Taylor, resulting in a total attorney fee award of $143,265.38. The Court **DENIES** Plaintiff's request for expenses and costs in its entirety, as untimely based on the Clerk's prior order awarding costs of $3,904.65 to Plaintiff. Finally, the Court **DENIES** Defendant's motion to strike and, alternatively, for a protective order as moot based on the stated fee award.

IT IS SO ORDERED this _____ day of _____, 2004.

BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE